IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 1199 of 2006

Reserved on: September 13, 2013
Decision on: October 29, 2013

SANTOSH DUTTA ..... Plaintiff
Through: Mr. S.K. Bhaduri, Advocate.

versus

SURENDER KRISHAN BALI & ANR. .....Defendants
Through: Mr. Suhail Dutt, Senior Advocate with Mr. N.K. Kantawala, Mr. Ritesh Mehra and Mr. Sankalp Goswami, Advocates for Defendant No.1.
Mr. Prag Chawla, Advocate for Defendants 2 and 3.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
29.10.2013

1. The present suit was filed on 29th August 2005 by late Smt. Santosh Dutta, daughter of late Shri Bal Krishan Bali and late Smt. Kaushalya Bali (now represented by her legal representatives (LRs) against her siblings Shri Surender Krishan Bali, Defendant No.1, Yogesh Ahuja, Defendant No.2 and Smt. Anju, Defendant No.3 (both of whom are the children of her deceased sister Smt. Kailash Ahuja and are residing in the United States of America). The relief sought in the suit is for seeking declaration of her 1/3rd share in the suit property at C-9/2, Vasant Vihar, New Delhi and for a preliminary and

final decree of partition, possession, rendition of accounts and permanent injunction in respect of the suit property.

2. The facts in brief are that the deceased Plaintiff is the eldest daughter of late Shri Bal Krishan Bali who expired on 27th November 1991 and Smt. Kaushalya Bali who expired on 20th October 2003. While according to the Plaintiff both her parents died intestate, the case of Defendant No.1 is that each of them left a Will. He claims that late Shri Bal Krishan Bali left a Will dated 18th April 1988 and Smt. Kaushalya Bali left a Will dated 28th October 1999. The Plaintiff expired on 26th December 2007. She is stated to have executed a Will dated 23rd July 2007 in favour of her son Shri Ashwani Kumar Dutta. The other LRs of the Plaintiff were impleaded as Defendants but have not appeared.

3. While directing summons to be issued in the suit on 31st August 2005, the Court restrained Defendant No.1 from selling, alienating or creating any third party interest in respect of the suit property. Thereafter interlocutory orders have been passed permitting the Defendant No.1 to let out portions of the suit property. The terms and stipulations of such lease deeds have been set out in the orders dated 25th September 2007 and 13th January 2010. Defendant No.1 was directed to place on record the copy of the lease deed, file quarterly accounts of the rent collected and expenses incurred. It was further directed that in the event the Plaintiff succeeded in the suit, she would

be entitled to the share of the rent and to that extent there shall be a charge on the share of Defendant No.1.

4. Attempts at mediation during the pendency of the suit failed. On 25th September 2007, the following issues were framed in the suit:

(1) Whether late Shri B.K. Bali executed a legal and valid Will dated 18th April 1988? OPD-1

(2) Whether late Shrimati Kaushalya Devi executed a legal and valid Will dated 28th October 1999? OPD-1

(3) If Issue Nos. 1 and 2 are answered in favour of the Plaintiff, what is the share of the parties in the suit property? Onus on the parties.

(4) Relief.

5. On behalf of the Defendant No.1 the following witnesses were examined:

(i) Surender Krishan Bali (DW-1)

(ii) Smt. Neelam Chawla (DW-2)

(iii) Vinod Kumar, Record Clerk from the office of Sub-Registrar (DW-3)

(iv) Shri S.C. Dewan (DW-4)

(v) Shri Ramesh Vohra (DW-5)

(vi) Shri Rajan Mittal (DW-6)

(vii) Shri Gopal Aggarwal, Sub-Registrar-III, Asaf Ali Road, New Delhi (also wrongly numbered as DW-6)

(viii) Shri Nagender Prashad, Assistant Cooperative Society Branch, Delhi Development Authority (DW-7)

(ix) Shri Diwan Singh, Officer from Punjab National Bank, Connaught Place, New Delhi (DW-8).

6. On behalf of the Plaintiff, Shri Ashwani Kumar Dutta was examined as PW-1and Shri Arun Kumar as PW-2.

Issue No. (1): Whether late Shri B.K. Bali executed a legal and valid Will dated 18th April 1988?

7. The Court first takes up Issue No.1 concerning the validity of the Will dated 18th April 1988 of late Shri Bal Krishan Bali. The said Will reads as under:

> "This is the last will of me, B.K. Bali, aged 78 years, resident of C-9/2 Vasant Vihar, New Delhi, made on this 18th day of April, 1988.
>
> 2. I hereby revoke all former wills and codicils made by me.
>
> 3. I appoint Shrimati Kaushalya Bali, my wife, resident of C-9/2, Vasant Vihar, New Delhi, as the sole

executor of this my will. If for any reason she is unable to act as executor of this my will, in that event Shri S.K. Bali, my son, at present residing at 9 Silver Sands, Juhu Park, Road, Bombay will act as my executor of this my will.

4. I own along with my wife Smt. Kaushalya Bali a double-storied house No. C-9/2 Vasant Vihar, New Delhi-110057, built on a plot of land measuring 400 sq. yards, which is my wholly self-acquired property. I hereby bequeath the aforesaid built house to my wife, Shrimati Kaushalya Bali for life without any power of alienation and after her death to my son, Shri S.K. Bali, at present residing at 9 Silver Sands, Juhu Park Road, Bombay-400049. He has helped me financially in the construction of the house.

5. I have two daughters, viz. (1) Mrs. Santosh Datta, wife of late Shri Chand Narain Datta, residing at 30/23 East Patel Nagar, New Delhi, and (2) Mrs. Kailash Ahuja, wife of Shri Pratap Ahuja, at present residing at 1412 Meander Drive, Naperville, I L 60656, USA. I bequeath national savings certificates of the value of Rs.15,500/- (Rupees fifteen thousand and five hundred only) to my daughter Mrs. Santosh Datta and national savings certificates of the value of Rs.15,200 (Rupees fifteen thousand and two hundred only) to my daughter Mrs. Kailash Ahuja, which had been purchased by me from time to time in my own name but on which I have nominated my daughters separately as my nominees. On my demise my daughters will be entitled to receive the proceeds of these certificates to themselves as their property. My wife and son will not have any claim or right to share the proceeds of these national savings certificates.

6. I also bequeath all my money and other property, movable and immovable, whatsoever and wheresoever,

not otherwise disposed of specifically by this will to my wife, Shrimati Kaushalya Bali.

In witness whereof, I the said, B.K. Bali, have put my signature to this my will on the day and the year first above written i.e. the 18th day of April, 1988.

Sd/-
(B.K. Bali)
Testator

Signed by the above testator in our presence at the same time and each of us has in the presence of the testator signed as the attesting witnesses.

"Drafted by me
Sd/- (B.K.Bali)

1. Sd/-B.P. Mittal
   B-8/1 Vasant Vihar, New Delhi 110057
2. Sd/- Jiwan Das
   A-11/3 Vasant Vihar, New Delhi 110057 "

8. The original of the above Will has been exhibited as DW-1/1. In para 4 the words "along with my wife Smt. Kaushalya Bali" has been handwritten by insertion above the typed words, "I own" and marked A to A and there are the initials of Mr. B.K. Bali on the left hand margin. Above the words 'B.K. Bali, Testator' there is the signature of Shri B.K.Bali and marked as 'Point A'. By the side of the typed letter there are hand written words "drafted by me". The signature of the first attesting witness Shri B.P. Mittal is at 'Point X' and of the second witness at 'Point C'. The reverse page of the Will has several endorsements. On the top of left hand corner there are handwritten words "document signed at residence on medical ground". The second is a rubber stamp with the handwritten words being filled and

signed by the Sub-Registrar with the date of 25th April 1988. It also bears the signature of Shri B.K. Bali. The second endorsement contains his registration number details and has the signature of the Sub-Registrar. Below that in a single line there are three signatures. The one on the left is of Shri B.K.Bali, the middle of Shri Jeewan Das and the one in the right purportedly of Shri B.P. Mittal. The bottom of the reverse page of the Will contains another rubber stamp of the Sub-Registrar with the date 4th May 1988. There is a handwritten endorsement alongside the said rubber stamp in black ink signed with date of 25th April 1988 stating: "Addition on Page No.I Clause No.4 is attested by the parties".

9. The case of Defendant No.1, as stated in his affidavit of examination-in-chief is that Shri B.K.Bali executed the aforementioned Will on 18th April 1988 and it was duly registered in the office of the Sub-Registrar and that Shri Jeevan Das and Shri B.P.Mittal were the attesting witnesses to the Will.

10. The Will is sought to be assailed as to its genuineness both by the Plaintiff as well as Defendants 2 and 3 on several grounds. It is submitted that under Section 63(c) of the Indian Succession Act, 1925 ('ISA'), the Will is required to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will in the presence and by the direction of the testator. One of the witnesses, Shri Jeevan Das, was not examined but his son Shri S.C.Dewan was examined.

According to the Plaintiff, Shri Dewan did not bring any authenticated document signed by Shri Jeevan Das so as to verify the signatures of Shri Jeevan Das. To prove the signature of the other attesting witness Shri B.P. Mittal, his grandson Shri Rajan Mittal was examined. His evidence has also been criticised by the counsel for the Plaintiff and Defendants 2 and 3 on similar grounds.

11. It is submitted by the Plaintiff and Defendants 2 and 3 that there are differences between the copy of the Will as provided to the Delhi Development Authority ('DDA') by Defendant No.1 for the purpose of mutation. The said copy was purportedly a certified true copy and has also been exhibited as Exhibit DW-7/2. It is pointed out that there are material differences in the endorsements on the reverse of the certified copy of the Will submitted to the DDA and those on the alleged original Will. Further, the handwritten portions on the first page of the certified copy of the Will differed when compared with the original Will. Further, there are several dates that figure on the body of the Will. The first paragraph states that it is made on 18th April 1988. The endorsement on the reverse shows two dates i.e. 25th April 1988 as well as 4th May 1988. The third date is 22nd April 1988 as shown in the *peshi* register brought by Shri Vinod Kumar, Record Clerk from the Office of Sub-Registrar at Asaf Ali Road, New Delhi. It is accordingly submitted that there are several suspicious circumstances that cast grave doubts on the genuineness of the Will.

12. The further ground of attack is that the endorsement on the

reverse of the Will that the document was signed at the residence on medical ground proves that the testator late Shri B.K. Bali was not in a sound state of mind and was not even physically fit to go to the office of the Sub-Registrar. No medical witness has been examined to prove the sound state of mind of the testator. It is submitted that the original Will could not be located in the office of the Sub-Registrar and only the *peshi* register was brought. This by itself indicates that the Will was perhaps not even registered. The other defect pointed out is that the extent of the suit property mentioned is 400 sq. yds whereas it is actually 420 sq. yards.

13. Before examining the above submissions, it is necessary to notice the relevant statutory provisions. Under Section 3 of the Transfer of Property Act, 1882 the word 'attested' has been defined as under:

> "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

14. Section 63(c) of the ISA reads as under:

> "The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his

> mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary".

15. Under Section 68 of the Indian Evidence Act, 1872 ('IE Act') at least one attesting witness has to be called for the purposes of proving the execution of the document, if such attesting witness is alive. The proviso to Section 68 makes it clear that where the document in question is a Will, then examination of one attesting witness is essential. Section 69 IE Act talks of the situation where no attesting witness can be found. It reads as under:

> "If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

16. 1 Before proceeding to analyse the evidence in the present case, the law as explained in the decisions of the Supreme Court may be noticed. In ***H. Venkatachala Iyengar v. B.N. Thimmajamma 1959 Supp (1) SCR 426***, it was observed (SCR, para 18):

> "What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The

party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether they will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he

> understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

16.2 The Supreme Court further noted (SCR, para 20) that: "The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator" Further, the Court stated (SCR, para 21):

> "…in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

17. The aforementioned principles have been reiterated in ***Bharpur Singh. v. Shamsher Singh (2009) 3 SCC 687*** as well as ***Benga Behera. v. Braja Kishore Nanda (2007) 9 SCC 72***.

18. In the present case, admittedly, both attesting witnesses to the

Will of late Shri B.K.Bali expired prior to the trial. Defendant No.1 examined Shri Rajan Mittal grandson of late Shri B.P. Mittal. The relevant portion of his affidavit of examination-in-chief reads as under:

> "That late Sh. B.P. Mittal expired on 5th May 1994 and the deponent was major at that stage and had seen his grandfather's writing and signing and also recognise his signature and the deponent has seen the Will executed as Ex.DW-1/1 and signature appearing on the Will are in the knowledge of the grandfather of the deponent and the same are appearing at point 'C' and 'D' on the Will Ex. DW-1/1."

19. In the cross-examination Shri Rajan Mittal admitted that his grandfather had not put his signature on the Will in his presence but that he knew Shri B.K. Bali and that he also knew Shri Jeevan Das. He clearly states that "I have seen the Will exhibit DW-1/1 and it bears the signature of my grandfather only at one place at point 'X'." Although he did not bring any document bearing the signature of his grandfather, he was very clear that the signature on the Will in the witness column was that of his grandfather. Nothing significant has been elicited in his cross-examination to discredit the evidence of Shri Rajan Mittal. Being the grandson of the attesting witness, it is likely that he recognizes the signature.

20. Shri S.C. Dewan son of Shri Jeevan Das was examined as DW-4. In his affidavit of examination-in-chief dated 13th November 2007 he stated in paras 2 to 5 as under:

> "2. That late Shri Jeewan Dass was the witness who signed on the Will dated 18th April 1988 executed by Shri B.K. Bali s/o Shri Amar Nath Bali r/o C-9/2, Vasant Vihar, New Delhi-110057.
>
> 3. That the deponent's father was the signatory of the Will before the Registrar and solemnly state that the signatures appearing on the Will Ex.DW-1/1 is the signature of the father of the deponent and he has signed the Will at point 'A' and 'B'.
>
> 4. That the deponent is well conversant with the handwriting of the father of the deponent and as such he can verify the signature of the father of the deponent.
>
> 5. That the deponent had seen his father's writing and signing."

21. The cross-examination of Shri Dewan did not yield anything that could discredit the truth of the above statements made by him on affidavit. He clearly stated that "signature at point 'C' at DW-1/1 are that of my grandfather Shri Jeevan Das". He denied the suggestion to the contrary.

22. The requirement in law, on a collective reading of Section 63(c) ISA and Section 69 IE Act, is only that where neither of the witnesses is available for examination then the evidence of a person who is able to prove the signatures of the attesting witness would be sufficient. Such person should be able to show that the attestation is the handwriting of the attesting witness. Secondly, it must be shown that the signature of the person executing the document is in the

handwriting of that person. As far as the first requirement is concerned, both Shri Rajan Mittal and Shri S.C. Dewan have been able to prove the signatures of the attesting witnesses Shri B.P.Mittal and Shri Jeevan Das respectively. As far as the second requirement is concerned, the signatures *per se* of Shri B.K. Bali on the Will are not in doubt. Although under Section 18(e) of the Registration Act, 1908 a Will is not compulsorily registrable, the fact that the Will of Shri B.K.Bali is registered lends it a greater weight as to the presumption of genuineness of his signature.

23. The discrepancies pointed out between the certified copy of the Will furnished to the DDA and that produced as the original Will before the Court can possibly be explained by the requirement at the relevant time by person executing documents to do so simultaneously in duplicate. This is traceable to Section 52 of the Registration Act which reads as under:

> "(1) (a) The day, hour and place of presentation, the photographs and finger prints affixed under Section 32A, and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;
>
> (b) A receipt for such document shall be given by the registering officer to the person presenting the same; and
>
> (c) subject to the, provisions contained in section 62, every document admitted to registration shall without unnecessary delay be copied in the book appropriated therefor according to the order of its admission.

> (2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector-General."

24. Section 52(1) (c) has further been amended as regards Punjab, Haryana and Chandigarh (which is also applicable to Delhi) as under:

> "(c) Subject to the provisions contained in Section 62, a copy of every document admitted to registration shall, without unnecessary delay, be pasted in the book appropriated therefor according to the order of admission of the document."

25. On a collective reading of Section 61 and Section 52(1) (c) of the Registration Act, as applicable to Delhi, it is seen that there is a requirement of a Will, which is sought to be registered, having to be simultaneously prepared in duplicate and signed. It is possible that while signing on duplicate copies and making the handwritten corrections, there may be a slight difference in the copy and the original. As far as the present case is concerned, when viewed in the above light, the differences appearing in the original and the copy (as furnished to the DDA) stand explained and in any event are not material to doubt the genuineness of the Will. Therefore, there is no merit in the contention that there are suspicious circumstances surrounding the original Will only because there are differences in the endorsement appearing therein and the endorsement in the certified copy produced before the DDA.

26. As regards non-availability of the original Will in the office of the Sub-Registrar, it is seen that Shri Vinod Kumar DW-3 brought with

him a detailed explanation furnished by Shri Gopal Aggarwal, Sub-Registrar-III on 27th April 2012 pursuant to the show cause notice issued to him. The explanation offered reads as under:

> "In this connection it is most humbly submitted that the office of the Sub-Registrar-III is one of the oldest SR offices in Delhi and has been functioning since 1939. The old records are all laden with dust and have also decayed due to the passage of time. These records are kept in an unsystematic and disorganized manner. Only the records up to the year 1985 in Book No.1, records up to the year 1981 in the Book No.III and records up to the year 1974 in Book No. IV have been transferred to the department of archives, 18-A, Satsang Vihar Marg, Qutab Institutional Area, Mehrauli, New Delhi.
>
> The undersigned, after taking over as Sub-Registrar-III on 19th December 2011 has taken up the initiative to streamline the available records. Approval of the competent authority for deployment of five literate persons has been sought to identify, sort, categorise and thereafter catalogue/index the records.
>
> However, the undersigned has issued memorandum to two erstwhile record keepers to explain the reasons for not being able to trace the records. Their reply is awaited. It is assured to the Hon'ble Court that efforts will be made again to trace the records while cataloguing/indexing the old records".

27. Shri Vinod Kumar brought with him the *peshi* register which has been marked as exhibit DW-6/1. It does reflect an entry against the Serial No.81 with the date 22nd April 1988 with the name B.K. Bali. There is nothing to show that this *peshi* register was tampered with.

The efforts made by Sub-Registrar Office to locate the original Will appear to be genuine.

28. Mr. Gopal Aggarwal, Sub-Registrar-III was examined on 19th February 2013. His deposition reads as under:

> "I was summoned to produce the Will of Mr. B.K. Bali dated 25.04.1988 which was registered vide No. 2125, Vol. No. 446, Book No.3, Page No. 82. I say that the record of the same is not traceable. In spite of my best effort in the last one year, the entire volume no. 446 is not traceable.
>
> However, I have brought the original Peshi Register of April-May 1988 which shows that the Will of Shri B.K. Bali was registered vide no. 2125, Vol. No. 446, Book No. 3, Page No. 82 on 04.05.1988. Copy of the same is taken on record which is marked as Ex.DW6/1 (original seen and returned)
>
> XXXX By Shri S.K.Bhaduri, Counsel for the Plaintiff
> The Peshi Register brought by me contains entries from March to June, 1988. As per record, this Will was presented for registration on 22.04.1988. It was finally registered on 04.05.1988. It is correct that as per the record brought by me today, the Will was not registered on 22.04.1988. It is wrong to suggest that the Will of Shri B.K.Bali was not registered in our office or that is why the same is not traceable in our office. It is wrong to suggest that the register brought by me contains fictitious entry with respect to the registration of the Will in question".

29. An application has been filed by the Plaintiff being IA No. 3466 of 2013 under Section 151 CPC for correcting the date mentioned by the above witness in the cross-examination in the sentence reading "it

is correct that as per the record brought by me today the Will was not registered on 22nd April 1988". It is submitted by the Plaintiff's counsel that the said date should be read as 25th April 1988. The Court finds no difficulty in allowing the prayer for correction of the aforementioned date. It will not make any difference to the position that the Will appears to have been finally registered on 4th May 1988 which has been clarified by the witness in the earlier portion of his affidavit as extracted hereinbefore. He has clearly stated that it is registered vide No. 2125 Volume 446, Book III, Page 82 on 4th May 1988.

30. It is not unusual to find more than one date in a document submitted to a Sub-Registrar for registration. Therefore, on the document that is registered one is likely to find (a) the date of its execution (b) the date of it being presented for registration in the office of the Sub-Registrar (c) the date when it is returned to the applicant after registration. In the present case, the Court is satisfied that Shri B.K. Bali did in fact execute the Will on 18th April 1988; that it was presented for registration on 25th April 1988 and that the Will was registered and the registered Will was returned on 4th May 1988.

31. The mere fact that Shri B.K.Bali was not physically able to come to the office of the Sub Registrar cannot lead to the inference that when signing the Will he was not in a sound state of mind. Since it is the Plaintiff who has raised a challenge to the Will it is for the Plaintiff to demonstrate that the testator was not in a sound state of

mind. The Plaintiff has not discharged that burden. Further, the mere discrepancy in the extent of the suit property as described in the Will is not sufficient to doubt the genuineness of the Will.

32. The Plaintiff and Defendants 1 and 2 have not been able to demonstrate before the Court that there are any suspicious circumstances surrounding the Will of late Shri B.K.Bali so as to doubt its genuineness. Issue No.1 answered in favour of Defendant No.1 and against the 1 and Defendants 2 and 3 by holding that late Shri B.K. Bali executed a legal and valid Will dated 18th April 1988.

Issue No.2: Whether late Shrimati Kaushalya Devi executed a legal and valid Will dated 28th October 1999?

33. The next issue is whether the Will executed by Smt. Kaushalya Bali on 20th October 1999 was genuine and valid. The said Will of Smt. Kaushalya Bali reads as under:

> "1. This is the last WILL of me, Mrs. Kaushalya Bali, aged 82 years, resident of C-9/2, Vasant Vihar, New Delhi-110057, made on this day of Oct 28th, 1999.
>
> 2. I hereby revoke all former Wills and codicils made by me.
>
> 3. I appoint Mr. Surinder Krishan Bali, my son, resident of C-9/2, Vasant Vihar, New Delhi as the sole executor of this my Will. If for any reason he is unable to act as executor of this my Will in that event Mrs. Neelam Bali, my daughter-in-law at present residing at C-9/2, Vasant Vihar, will act as my executor of this my Will.

4. I along with my husband own a double storied house C 9/2 Vasant Vihar, New Delhi-110057, built on a plot of land measuring 400 Sq. yards. My husband bequeath his ½ share in the said property in my favour by virtue of the registered Will dated 18/4/88 Registered as Document No.2125 volume No.446 at pages 82: Now I am the absolute owner of the property No. C 9/2 Vasant Vihar, New Delhi. I hereby bequeath the aforesaid built house to my son Mr. Surinder Krishan Bali for life and after his death to my daughter-in-law Mrs. Neelam Bali at present residing at C 9/2 Vasant Vihar, New Dehli-110057. My son, Mr. Surinder Krishan Bali has helped my financially in the construction of the house. I do not want to give anything to any other legal heirs.

I also bequeath all my money, my bonds and other property movable and immovable to my son Mr. Surinder Krishan Bali.

In witness whereof, I the said Kaushalya Bali have put my signature to this my will on the day and the year first above written i.e. 28th day of October, 1999.

(Kaushalya Bali)

Testator

Signed by the above testator in our presence at the same time and each of us has in the presence of the testator signed as the attesting witnesses."

34. It appears that the Plaintiff gave an affidavit on 27th April 2004 to the DDA (Ex. DW-1/3) acknowledging the above Will dated 28th October 1999. However, the Plaintiff on 1st June 2005 wrote to the DDA (Ex. DW-7/P-2) objecting to the grant of mutation in favour of Defendant No.1 in respect of the suit property. Likewise, counsel for

the Plaintiff wrote a letter to the DDA on 3rd June 2005 (Ex DW7/P1) to the same effect. The above Will of Smt. Kaushalya Bali has been assailed by the Plaintiff and Defendants 2 and 3 as to its genuineness on several grounds.

35. There are two witnesses to the above Will of whom only one, Smt. Neelam Chawla has been examined as DW-2. Her signature on the Will has been marked as 'Point E.' Before proceeding to examine the evidence of Smt. Chawla, the law in regard to examining of witnesses to a Will in terms of Section 63 ISA may be noticed. In ***Janki Narayan Bhir v. Narayan Namdeo Kadam (2003) 2 SCC 91***, the Supreme Court explained that in terms of Section 68 IE Act, the attesting witness who is alive and capable of giving evidence had to be necessarily examined if the document required by law to be attested had to be used in evidence. It was explained, on a combined reading of Section 63 ISA with Section 68 IE, that a person propounding the Will had to prove that the will was duly and validly executed. At least one attesting witness had to be called for proving due execution of the Will as envisaged in Section 63 ISA. If one attesting witness could prove execution of the Will, the examination of other attesting witness could be dispensed with. The one attesting witness who was examined, had to satisfy the attestation of the Will by him and the other attesting witness in order to prove there was due execution of the Will. Where the one attesting witness failed to prove the attestation of the Will by the other witness, there would be

deficiency in meeting the mandatory requirements of Section 68 of the IE Act.

36. The affidavit of evidence of Smt. Neelam Chawla dated 13th November 2007 reads as under:

> "1. That the deponent knew Smt. Kaushalya Bali very well and on 28th October 1999 she executed a Will where the deponent also signed as a witness and her signatures are appearing at point 'E' exhibited DW-3/1.
>
> 2. That the deponent knew that at the time of execution of the Will who was sound and in a well disposing mind and the contents of each and every line of the Will was read over to her by the deponent.
>
> 3. That the Will was drafted by me as desired by her being a lay person and after understanding fully, the contents, Smt. Kaushalya Bali signed in Hindi on the Will and I too signed in her presence where Shri Gaurav Jain was also present and we both signed on the Will exhibited as DW-3/1 and our signatures are appearing on the Will which is marked at point 'D' & 'E'.
>
> 4. That Smt. Kaushalya Bali expired on 20th October 2003 and Will was according to her wishes and she was never under any influence and it was completely free Will of the deceased namely Smt. Kaushalya Bali.
> 5. That the Will was also notarised on the same very day i.e. 28th October 1999 by Notary Public appointed by Delhi Administration.
>
> 6. That the contents of the affidavit are true to my knowledge."

37. Smt. Neelam Chawla was extensively cross-examined. The

answers given by her in cross-examination were to the effect that she knew Shri Gaurav Jain as he was her colleague and working in the same office; that Smt. Kaushalya Bali was a family friend and used to treat Smt. Neelam Chawla as her daughter; that Smt. Kaushalya Bali did not know English; that Smt. Kaushalya Bali told Smt. Chawla in 1999 that she wanted to make a Will and bequeath her property to her son as he had really taken care of her and her late husband and that they had done a lot for their daughters; that she got the Will drafted with the help of Shri Kishore Malhotra, Advocate and thereafter read over the Will to Smt. Kaushalya Bali in Hindi which she accepted; that subsequently they took the Will to the Notary Public who read over the Will to Smt. Bali in Hindi and thereafter it was notarized and that Shri Gaurav Jain was also present at the time of execution and notarization of the Will. Smt. Chawla further stated: "it is correct that in my affidavit it is mentioned that I had drafted the Will. (Vol. I drafted the Will with the help of Mr. Kishore Malhotra, Advocate). The Will was got typed by Mr. Kishore Malhotra. Kaushalya Bali was alone at the time execution of Ex. DW2/1".

38. Much is tried to be made of the fact that aforementioned statement appears to be inconsistent with what was stated by Mrs. Chawla in her affidavit of examination-in-chief. It is sought to be suggested that since Smt. Kaushalya Bali signed the Will at her residence and Shri Gaurav Jain signed it at Tis Hazari complex, both witnesses had not seen Smt. Kaushalya Bali signing the Will. Further, it is submitted that since Shri Gaurav Jain was not examined there is

nothing to show that the signature "Gaurav Jain" appearing on the Will is in fact his. It is suggested that Smt. Kaushalya Bali did not know Shri Gaurav Jain at all and, therefore, the question of her signing the Will in his presence did not arise and, therefore, Defendant No.1 has forged the said Will. It is further submitted that since Smt. Neelam Chawla was working in the same office as Defendant No.1, she has deposed falsely in order to help him.

39. The above submissions are without merit. On a careful examination of the evidence of Smt. Neelam Chawla, her testimony appears natural and probable. It is clear that she engaged the services of Shri Kishore Malhotra to draft a Will on the instructions of Smt. Kaushalya Bali. It must be remembered that Smt. Chawla was talking of an event that happened in 1999 more than 12 years later in 2011 and her evidence should not be seen as one given during a criminal trial. Her replies to the various questions have to be understood in that context. She states that she and Smt. Kaushalya Bali put their respective signatures on the Will at the residence of Smt. Bali whereas Shri Gaurav Jain signed the Will as a witness at the Tis Hazari Court Complex. There is nothing to suggest that Shri Gaurav Jain did not sign the Will as an attesting witness in the presence of Smt. Kaushalya Bali or Smt. Neelam Chawla. In fact she says: "we took the Will to the Notary Public and Notary Public read over the Will to her in Hindi and thereafter it was notarised". Shri Gaurav Jain was present at the time of notarisation of the Will. Thus

it is apparent that the testator and both the witnesses were present at the same time.

40. The requirement of Section 63(c) can be said to have been met as a result of the above sequence of events. The last portion of Section 63(c) clearly states that "but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary". In ***Anita Khosla v. State 173 (2010) DLT 290***, this Court explained that "it is also not necessary that all the witnesses must see the testator sign. It may as well happen that one witness may see the executor sign and the other witness may not see him sign, but the testator may acknowledge his signature before him." The requirement of Section 68 IE Act has been met inasmuch as one of the witnesses has been called for examination and it has been satisfactorily stated by him that both the witnesses were present with the testator at the time of notarisation of the Will. Nothing has been elicited in the long cross-examination of Smt. Neelam Chawla to discredit the above evidence. It is not possible to conclude that Smt. Neelam Chawla is deposing falsely or at the behest of Defendant No.1 or that the Will has been forged as alleged by the Plaintiff. The non-examination of Shri Gaurav Jain does not impinge on the validity of the Will since the evidence of Smt. Neelam Chawla is clear and sufficient to conclude that the testator signed the Will in her presence and was in a sound state of mind and that both she and Shri Gaurav Jain were present at the time of notarisation of the Will.

41. The decision in ***Kishan v. Tulki Devi 2013(1) Civil Court Cases 548 (HP)*** does not help the case of the Plaintiff. The said decision turned on its own facts. It referred to the decision of the Supreme Court in ***Lalita Ben Jayantilal Popat v. Pragnaben Jamnadas Kataria AIR 2009 SC 1389*** which held that a Will has to be proved "not only by proving the signature of the executor but it should be found to be free from any suspicious circumstances". In the present case, there are no suspicious circumstances to doubt the Will of Smt. Kaushalya Bali. The other decisions relied upon by the Plaintiff in ***Dr. M. Ratna v. Kottiboyina Navaneetam AIR 1994 AP 96, Ragni Chopra v. Rajesh 2013(1)134 DRJ 316*** and ***Sudershan Lal Maini v. Virender Kumar Maini 187 (2012) DLT 414*** reiterate the settled law regarding validity and genuineness of Wills in terms of Section 63(c) of the IS Act and Section 68 of the IE Act.

42. Issue No.2 is answered in favour of the Defendant No.1 and against the Plaintiff and Defendants 2 and 3 by holding that the Will executed by Smt. Kaushalya Bali on 28th October 1989 is a legal and valid document.

43. In that view of the matter, Issue No.3 does not survive for consideration since the property at C-9/2, Vasant Vihar, New Delhi is held to be the absolute property of Defendant No.1 in terms of both the Wills dated 18th April 1988 of late Shri Bal Krishan Bali and Will dated 28th October 1999 of late Smt. Kaushalya Bali. Consequently,

the question of declaration of the shares of the parties in the suit property or granting a decree of partition does not arise.

44. The suit is dismissed with costs of Rs.20,000 which will be paid by the Plaintiff as well as Defendant Nos. 2 and 3 to Defendant No.1 within four weeks.

S. MURALIDHAR, J.

OCTOBER 29, 2013
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